Great Lakes Window, Inc. a Subsidiary of Ply Gem Industries *and* Aubry Stallworth. Case 8–CA–26402

October 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On May 10, 1995, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

A. *Background*

1. The judge found, and no party disputes, that the Respondent knew that its employee, Aubry Stallworth, was an active union supporter. Thus, in 1993, Stallworth openly supported Aluminum, Brick and Glass Workers International Union (the Union) during that Union's campaign to represent employees of the Respondent. In August 1993, after Stallworth expressed his support for the Union, the Respondent's operations vice president, Gary Delman, told Stallworth that the latter knew ''what happens to people who more or less support the Union.''[2] Further, in November 1993, Stallworth served as the Union's observer in a Board-conducted election that the Union lost, 240–170.

2. The judge also found that about January 7, 1994, the Respondent violated Section 8(a)(1) when Delman and manufacturing manager, Larry Vandevelde, directly and impliedly threatened Stallworth and other employees with retaliation and discharge because of their union or other protected activities. Specifically, the judge found that, when Stallworth attempted to act as a witness for two employees who were protesting the Respondent's application of its no-fault attendance policy, Vandevelde swore at the employees, telling them to ''quit crying and if [they] didn't like it, [they] could just quit.'' In addition, Delman accused the employees of ''starting trouble again.'' Later, Delman also told Stallworth that he was sick of troublemakers causing trouble, and that ''[e]ventually all the troublemakers will be gone and I'll be here and then the plant can get back to normal.''

The judge found that these statements violated Section 8(a)(1), and the Respondent did not except.

3. The judge next determined, and we agree, that based on Stallworth's union and protected activities, Delman's August 1993 statement to Stallworth, and the 8(a)(1) violations, the General Counsel established a prima facie case that the Respondent's December 1993 suspension and January 1994 termination of Stallworth were unlawfully motivated. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As found by the judge, the burden then shifted to the Respondent to establish that, regardless of his union or protected activities, Stallworth nonetheless would have been disciplined and discharged.

The Respondent argued to the judge that it had met its *Wright Line* burden by establishing that, in any event, Stallworth would have been suspended and discharged under its 75-point attendance policy. The Respondent asserted that under this attendance policy, employees accumulating 65 points in a 6-month period were suspended for 2 weeks, and those assessed 75 points during the same period were terminated. The Respondent further contended that, during his last 6 months of employment, Stallworth had accumulated 74 points by December 10, and 75 points by January 26, 1994. On this basis, the Respondent argued that it lawfully suspended and discharged him.

The judge found that Stallworth, an otherwise good worker, had chronic attendance problems. The judge further determined that the Respondent had warned Stallworth about the problem three times in 1992 and twice in 1993. Additionally, the judge found that: (1) the Respondent maintained a 6-month, 75-point attendance policy; (2) between July 1 and December 10, 1993, Stallworth received 74 points for tardiness and absences; and (3) on January 26, 1994, Stallworth was assessed an additional point for arriving late. Notwithstanding these findings, however, the judge rejected the Respondent's defense. Based on his own calculations and interpretation of how points should be tabulated under the Respondent's attendance policy, the judge determined that Stallworth had not accumulated enough points to warrant either his suspension or discharge. Further, because the Respondent's attendance policy was its sole defense to allegations that it unlawfully suspended and discharged Stallworth, the judge concluded that the Respondent had failed to rebut the prima facie case.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] This statement was made more than 6 months prior to the filing of this unfair labor practice charge and is not alleged to violate the Act.

The Respondent excepts. It asserts, among other things, that the judge: (1) improperly substituted his own interpretation of the Respondent's attendance policy for the one specified in that policy and consistently followed by the Respondent; and (2) incorrectly failed to find that Stallworth was lawfully suspended and terminated under the policy. For the following reasons, we find merit in the Respondent's exceptions.

B. *Attendance Policies*

1. The 90-point policy

Prior to July 1, 1993, the Respondent maintained a 90-point, no-fault, attendance policy under which employees were assessed points for absenteeism or tardiness. Under this policy, employees accumulated points each time that they failed to clock in or out, were more than 3 minutes late for work, left early, or missed work.[3] When an employee's points reached specified levels during a 6-month period, progressive discipline was imposed, culminating in discharge at 90 points.[4] Employees, including Stallworth, were informed of the 90-point attendance policy, and were provided copies of it upon hire.[5]

The 90-point policy specifically provided that points would be tabulated by totaling them ''for a six-month rolling period (most current month shall be added and the least current month shall be *dropped* to keep the period current and equal to six months.)''(Emphasis added.)[6] Pursuant to this formula, the Respondent issued Stallworth a first warning, dated June 11, 1993, after he had accumulated 45 points in the rolling, 6-month period beginning in January 1993.[7]

2. The 75-point policy

In July 1993, the Respondent modified its attendance policy by reducing from 90 to 75 the point total warranting discharge.[8] The Respondent notified employees of the revised policy July 6 in letters stating that: (1) the point scale has been reduced by 15 points; (2)''[a]ll the rules of the attendance system . . . remain the same;'' and (3) discipline is adjusted as follows:

30 points	1st warning
40 points	2d warning
57 points	3 days' suspension without pay
65 points	2 weeks' suspension without pay and 60 day probation upon return to work, during which time any points accumulated causing the grand total to equal or exceed 75 will result in involuntary separation from employment
75 points	involuntary separation from employment

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[3] A maximum of eight points could be assessed in any 1 day.

[4] Under the 90-point policy, the following discipline was imposed:

45 points	first warning
55 points	second warning
72 points	3 days' suspension without pay
80 points	final warning; 2 weeks' suspension without pay 60 day probationary period (any points accumulated during the probationary period causing grand total to equal or exceed 90 will result in involuntary separation from employment)
90 points	involuntary separation from employment Accumulation of 80–89 points more than once in a 12-month period is basis for termination

[5] R. Exh. 4. G.C. Exh. 3.

[6] G.C. Exh. 4. Contrary to the judge, the 90-point policy specified that points accrued in the least current month would be ''dropped,'' not ''deducted'' or ''subtracted.'' The distinction between this terminology, as interpreted by the judge, may be significant, as illustrated by the following:

Month	*Points accumulated*
Nov. 1992	20 dropped
Dec. 1992	6
Jan. 1993	10
Feb. 1993	3
Mar. 1993	11
Apr. 1993	16
May 1993	18

Under the system specified in the 90-point policy, points accrued during the 6-month period of December through May would be tallied and November's points would drop off, i.e., not be counted. This would result in 64 points and a second warning under the 90-point system. If, however, as construed by the judge, November's points were subtracted from the December through May total, the employee's points would be reduced to 44 (64–20), and no discipline would attach.

As discussed below, there is no evidence that the Respondent ever used the judge's subtraction system when tabulating points under its attendance policy.

[7] R. Exh. 6.

[8] There is no evidence or claim that the attendance policy was revised in response to the Union's organizational drive, or that it was otherwise unlawfully motivated.

By stating that the attendance-policy rules remained the same, the Respondent explicitly continued the rolling, 6-month period for calculating points and the system whereby points in the least current month are ''dropped.''[9]

To prevent employees from being unfairly penalized by the change to the newly reduced point system, the Respondent, as it informed employees in the July 6 letters, recomputed their points to ''reflect[] the 15 point drop with the new scale, as well as the points you *dropped* from the least current of your six-month rolling period.'' (Emphasis added.) According to Stallworth's letter, as of July 1 his recomputed 6-month total was 33 points.[10] Without this 15-point drop, Stallworth would have carried 48 points into the new system and immediately been subject to a second warning on the scale of progressive discipline.

The Respondent asserts that the 15-point drop specified in the July 6 letter was not a continuing deduction, but applied only to points assessed under the 90-point policy. Thus, contends the Respondent, when the 6-month period for tabulating points included periods covered by the 90-point system, it deducted up to 15 accumulated points.[11] Beginning in December 1993, however, once the 75-point system had been in effect for 6 months, the Respondent asserts that the 15-point drop ceased and points were to be tabulated on a straight, 75-point basis.

The Respondent tabulated Stallworth's points consistent with this interpretation of the 75-point policy. Thus, in late August 1993, Stallworth was assessed a second warning after accumulating 42 points in the preceding 6 months.[12] As evidenced by Stallworth's attendance records, the Respondent tabulated Stallworth's points by: (1) dropping points earned in February 1993; (2) adding points accumulated from March through August 1993; and (3) dropping 15 points earned prior to July 1.[13] Thus, because the 6-month period on which the warning was based included months governed by the 90-point system, the Respondent deducted 15 points from Stallworth's total.

Conversely, when Stallworth was disciplined in December 1993 and January 1994, it was for periods arising solely under the 75-point system. In these instances, the Respondent did not deduct 15 points from his 6-month totals. Instead, based on the following computations, it placed Stallworth on 2-weeks' suspension on December 10, 1993, for accumulating 73 points:

June 1993	4 dropped
July 1993	16
Aug. 1993	10
Sept. 1993	5[14]
Oct. 1993	15
Nov. 1993	10
Dec. 1993	17
	73 points

Following this suspension, Stallworth was placed on probation for 60 days, as specified in the July 6 letter. Any additional points Stallworth earned under the policy, while on probation, would be added to the 73 already accumulated. Accordingly, when Stallworth received additional points for tardiness on December 10 and January 26—bringing his total to 75—he was terminated.

Even more significantly, the Respondent applied its attendance policy in the same manner to other employees. The uncontroverted evidence establishes that the Respondent discharged nine other employees between November 1993 and March 1994 for similar violations of its 75-point attendance policy.[15] Eight of these em-

[9] Contrary to the judge, we do not find that the Respondent ever maintained a contrary position.

[10] In recomputing Stallworth's points, the Respondent:(1) dropped points he was assessed in January 1993; (2) totaled points he accrued from February until July; and (3) credited him with a 15-point drop:

Jan. 1993	1 dropped
Feb. 1993	15
Mar. 1993	6
Apr. 1993	18
May 1993	5
Jun. 1993	4
July 1993	-
	48-15 = 33 points

Contrary to the judge's tabulations, we find that these 33 points reflected Stallworth's 6-month total as of July 1, 1993. This total was not a static figure to be reused when measuring Stallworth's subsequent point accumulations.

[11] Although not explicitly set forth in the July 6 letter, the Respondent asserts that the 15-point deduction was a maximum and not a guaranteed reduction. Thus, according to the Respondent, employees who accumulated fewer than 15 points in the 6-month period prior to July 1, 1993, had their points reduced to zero. They did not, however, receive negative point credits to offset future point accumulations.

[12] R. Exh. 7. Stallworth was not presented with this warning until September 10, 1993.

[13] Although Stallworth's warning was dated August 31, it appears that two points he was assessed on August 30 and 31 were not added to the tabulated points.

[14] The judge incorrectly stated that Stallworth accumulated four rather than five points in September 1993.

[15] The Respondent offered into evidence the attendance records of 22 employees, besides Stallworth, whom it discharged between November 1993 and March 1994 for violating its attendance policy. The General Counsel argued that the records of 15 of these employees were irrelevant because they related to employees who were in probationary status, subject to different time and point formulations. The record establishes that 13 of the 22 employees apparently were probationary workers terminated within their first 90 days of employment, after accumulating fewer than 75 points. However, even as to these 13, it is relevant that the Respondent calculated their points in the same manner as it did Stallworth's. Further, as to the remaining nine discharged employees: Michelle Leu, Lorenzo Vargas, Sam Viengmany, Ed (Jack) King, Miran Gunnels, Aaron

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ployees, like Stallworth, were discharged after the 75-point policy had been in effect for at least 6 months. As to each of these employees, the Respondent computed their points by: (1) dropping off (but not subtracting) points earned in the month immediately preceding the 6-month period; and (2) totaling the points they earned in the most recent 6-month period. No 15-point deduction was given.[16] For example, the records of Michelle Leu reflect that she was terminated on December 20, 1993, based on the following accumulation of points:

June 1993	2 dropped
July 1993	14
Aug. 1993	8
Sept. 1993	4
Oct. 1993	10
Nov. 1993	21
Dec. 1993	24
	81 points[17]

Finally, the discharge of the ninth employee, Lorenzo Vargas—who was terminated for points accumulated under both the 90- and 75-point systems—is consistent with the Respondent's interpretation of its attendance policy. Thus, Vargas' points during the rolling, 6-month period were tabulated (including the period he was on probation), points in the month immediately preceding the 6-month period were dropped, and a 15-point deduction was taken for points earned prior to July 1, 1993.

Mar. 1993	0 dropped
Apr. 1993	11
May 1993	10
June 1993	18
July 1993	33
Aug. 1993	13
Sept. 1993	0 (2-week suspension; Vargas on probation until Nov. 13, 1993)
Oct. 1993	2
Nov. 5, 1993	8
	95-15 point credit = 80 points

Based on the foregoing we find that the Respondent consistently applied its attendance policies by: (1) adding points assessed during the most recent 6-month period; (2) dropping points from the month immediately preceding this 6-month period; and (3) deducting up to 15 points under the 75-point system when the 6-month period included points earned under the preceding 90-point system. We further find that the Respondent uniformly applied this system to its employees, including Stallworth. Finally, we conclude that under this system, Stallworth had accumulated sufficient points for suspension in December 1993 and discharge in January 1994. In these circumstances we find, contrary to the judge, that the Respondent has rebutted the General Counsel's prima facie case by establishing that, regardless of Stallworth's union or other protected activities, he nonetheless would have been suspended and discharged under the Respondent's attendance policy.

Accordingly, we dismiss allegations that the Respondent violated Section 8(a)(3) and (1) by suspending and terminating Stallworth. We have modified the judges proposed Order and notice consistent with this finding.

ORDER

The National Labor Relations Board orders that the Respondent, Great Lake Windows, Inc. a Subsidiary of Ply Gem Industries, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening its employees with retaliation because of their participation in union or other protected concerted activities.

(b) Directly threatening any employee with discharge because of his union or protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Toledo, Ohio, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

Nagy, Art Cornelius, Bruce Stahl, and Dana Burchell, the evidence demonstrates that the Respondent applied its attendance policy in the same manner as it did to Stallworth.

[16] Although there are some minor mathematical errors in the records of these employees, there is nothing that undercuts our finding that the Respondent used the same basis for calculating their points as it did Stallworth's.

[17] Some employees, like Leu, had accumulated more than 75 points at the time of their discharge. This was typically caused by the fact that they missed their final day of work, resulting in 8 additional points—more than was required for discharge.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly threaten our employees with retaliation for engaging in union or other protected concerted activities.

WE WILL NOT directly threaten our employees with discharge for engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

GREAT LAKES WINDOW, INC. A SUBSIDIARY OF PLY GEM INDUSTRIES

Mark F. Neubecker, Esq., for the General Counsel.

John A. Lawrence, Esq. (Richmond, Lawrence, Mann, Greene, Arbiter and Chlzever), of Beverly Hills, California, for the Respondent.

Aubry Stallworth, of Holland, Ohio, pro se, for the Charging Party.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based upon a charge filed on May 24, 1994, by Aubry Stallworth, an individual (the Charging Party or Stallworth), the Regional Director for Region 8 (the Regional Director), of the National Labor Relations Boardand the Board, issued a consolidated complaint[1]. A subsidiary of Ply Gems Industries (the Company or Respondent) had violated certain provisions of the National Labor Relations Act (the Act). The Respondent filed a timely answer in which it denied the commission of any unfair labor practices.

Pursuant to notice contained in the consolidated complaint, a hearing was held before me in Toledo, Ohio, on December 5, 1995, at which the General Counsel and the Respondent were repesented by counsel, and the Charging Party represented himself. All parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make motions and offers of proof, and to argue orally.

After the conclusion of the hearing, the Respondent and the General Counsel filed briefs, which have been carefully considered.

Now, based upon the entire record of this case, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a Delaware corporation with an office and plant in Toledo, Ohio, where it has been at all times material engaged in the manufacture and sale of windows and window products. It annually ships from its Toledo location goods valued at over $50,000 directly to points outside of the State of Ohio. The complaint alleges, the answer admits, and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, and the parties stipulated at the hearing, that the Aluminum, Brick and Glass Workers International Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Campaign*

Beginning in the late spring of 1993, the Union began an organizing campaign among the Company's workers. There were about 375 to 400 full-time employees at that time including about eight people in the maintenance department.

Aubry Stallworth was hired in September 1988, and some time later he moved to the maintenance department. During the union campaign Stallworth testified that he signed an authorization card for the Union, wore union buttons and insignia and had conversations with his supervisor, Steve Danko, and Operations Vice President Gary Delman where he expresssed his loyalty to the Union. After a conversation in which Stallworth and Delman indicated their opposing views about the Union, sometime in August 1993, Delman concluded the talk by telling Stallworth that with the Union in

[1] This case was originally consolidated with two other cases, Case 8–CA–26400, filed by Brian Edward Brazleton, and Case 8–CA–26401, filed by Bernard Griffin, individuals, against this same employer. At the hearing on December 5, 1994, the General Counsel represented to me that the parties had agreed to settlements in Cases 8–CA–26400 and 8–CA–26401. I approved these settlements and, upon motion of the General Counsel under the date of January 9, 1995, stating that the undertakings of the parties under the settlement agreements had been fullfilled, I ordered the severance of Cases 8–CA–26400 and 8–CA–26401 from Case 8–CA–26402; and approved the withdrawal of the two prior cases, and the withdrawal of those portions of the complaint dealing with those two cases.

or out, he would always be there, and that Stallworth knew ''what happens to people who more or less support the Union.'' At the union election on November 12, 1993, Stallworth served as a union observer. In spite of Stallworth's support, the Union lost the election by 70 votes.

B. *The January 7, 1994 Incident*

On January 7, 1994, Stallworth accompanied two other employees, Brad Jones and Otis Braggs, to Gary Delman's office during their morning break. Braggs and Jones had objections to the Company's application of the no-fault point system which it maintained as part of its attendance policy. When Jones and Braggs began to discuss their grievance with Delman, the latter asked Stallworth what he was doing there. Stallworth replied that he was a ''witness.'' Delman retorted that ''they don't need no damn witness.'' Stallworth said that he was on his break anyway, that he might as well listen in. Delman then asked ''what the hell were they doing there. It looks like you-all are starting trouble again.'' The employees said no—they were not trying to start trouble. They just wanted some understanding of how the point system worked.

At this point Larry Van De Velde,[2] the Company's manufacturing manager, came in. He joined the discussion by saying that the employees shouldn't be there. Stallworth said that the employees had tried to explain why they were there. Then Van De Velde started ''cussing them out.'' He and Delman told the employees to ''quit crying or just quit.'' Stallworth testified that he said they had come to the office under the Company's ''open door'' policy to discuss the point system, but that the management people were treating them not like men, but like they weren't even working there. Van De Velde continued cursing at them, so, seeing that their break was nearly over, the employees went back to work.

Later that morning Delman came down to where Stallworth was working. According to Stallworth, Delman said he was ''sick of you always causing trouble.'' Delman then began to ''poke'' Stallworth.[3] Stallworth asked him to stop, and tried to explain that they were just trying to use the open door policy. Delman said, again, that he was sick of ''troublemakers, causing trouble, trying to keep stuff up.'' He then added that the complaint the employees were trying to talk about had no merit anyway, that the computer showed that their position was in error. Delman concluded by saying that ''Eventually all the troublemakers will be gone and I'll still be here and then the plant can get back to normal.''

Neither Delman nor Van De Velde testified in this proceeding. Kate Baker, manager of human relations for the Company, testified that Delman had left the Company's employ in August 1994, and Van De Velde left in September 1994. Baker said that she did not know where they were working, but she did know that both of them still lived in the Toledo area. The Company, according to Baker, did not try to get hold of them for this hearing.[4]

I find the testimony of Stallworth in this area to be forthright and candid, and I find that Delman and Van De Velde did make the statements ascribed to them in Stallworth's testimony. These statements contain, in the case of Van De Velde, indirect threats to punish the ''troublemakers,'' and in Delman's case, direct threats to discharge Stallworth as a particular ''troublemaker'' *Maremont Corp.*, 294 NLRB 11 (1989).

I find that the General Counsel has established a prima facie case through Stallworth's testimony, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), and since the Respondent has presented no evidence in contradiction of that prima facie case, I find that by impliedly threatening Stallworth, Jones, and Braggs on the morning of January 7, 1994, the Respondent has violated Section 8(a)(1) of the Act. I find, also, that by directly threatening Stallworth with discharge later on the morning of January 7, 1994, the Respondent has violated Section 8(a)(1) of the Act.

C. *Stallworth's Discharge*

Stallworth was a good worker, but he had a problem with attendance. Steve Danko, Stallworth's supervisor in maintenance, testified that, aside from attendance, he had no problems with Stallworth as a worker. But Stallworth was constantly on the edge as far as attendance was concerned. Attendance records submitted by Respondent (R. Exhs. 1 and 2) show that in 1992 he was warned three times about attendance, and in 1993 he was warned twice.

As far as the 1993 attendance figures were concerned Stallworth testified that he felt that his reporting times were being juggled by his supervisors, thus leaving him vulnerable to tardiness. However, his testimony was really based on suspicion rather than fact. Both Steve Danko, his immediate supervisor, and Andy Gonzalez, the plant superintendent in 1993, denied that Stallworth's shift had been varied, as he had thought. Without any corroboration, or records, I feel that he was mistaken about this.

The records show that Stallworth was late quite often in 1993. Under the Company's employment policy he was given a first warning on July 16, and a second warning on September 10. Then, in December, Stallworth ran into a problem with the law. According to his testimony, he got a traffic ticket on December 2, and had to go to court on December 3. He said that he went to Danko's house the evening of the second and asked if he could use a vacation day for December 3. Danko said yes, but later turned him down. Danko recalled that Stallworth came to his home, and asked him if he could use a vacation day but that he told Stallworth that it was against company policy to grant permission of this sort while at home. It had to be done in the office at the plant.

In any event, Stallworth had to spend Friday the third of December in jail, and had to return to court on Monday, December 6. He then missed another full day of work.

[2] Spelled ''Vanderbilt'' in the transcript, and ''Van Der Veld'' in the complaint and the General Counsel's brief.

[3] It was not clear what the poking consisted of, but it may have been for emphasis.

[4] Knowing from my own experience that there can be a number of perfectly logical and legitimate reasons why a lawyer may not wish to call a witness, I am hesitant to draw inferences that the testimony of witnesses like Delman and Van De Velde would have been inconsistent with the position of the Respondent. It is enough, in this, as in many other cases, that these witnesses did not testify, leaving credible testimony unrebutted, in order for me to draw a conclusion adverse to the position of Respondent.

Under the Respondent's no-fault point system,[5] Stallworth would have received 16 points (at 8 points for each 8-hour day missed for December 3 and 6). According to figures which Gonzalez and Danko received from the Company's human relations office, by December 9 he had only two more points to go for discharge. Under their system of progressive discipline, Stallworth was called into the office by Gonzelez and Danko on December 10, and given a 2-week suspension. He also had been late again on December 10, so, at this stage, he had only one point left before he would be discharged.

After his suspension, Stallworth returned to work on December 27. He had some problems in avoiding the final attendance point, managing to use 2 days of sick leave in one-half day segments on January 6, 8, 9, and 17, 1994, to avoid receiving a point. But, on January 26, it snowed in Toledo, and Stallworth, although he tried to leave home early, did not make it, punched in 7 minutes late, and was discharged.[6]

D. *The Company's Attendance Policy*

The Company's attendance policy was set out in an employee handbook given to all employees. Basically, it provided for a system of points to be given if an employee was late, left early, or was absent. These points were given regardless of the reason. Absences or tardiness should have been reported to a supervisor, but that notice did not exempt the employee from receiving points.

Once given, points were to be deducted from an employee's total on a rotating 6-month basis. Points for the current month would be added, and at the same time, points given in the sixth month previous, would be deducted.

In July 1993, the total of points required for discharge was reduced from 90 to 75. At the same time 15 points were deducted from employees' totals, in order to be fair to the employees. A new system of warnings was also instituted, providing for a first warning with 40 points; 2 days' suspension without pay for 57 points; 2 weeks' suspension without pay for 65 points, along with a 60-day probation period after the suspension was served; and discharge for 75 points.

Stallworth received a notice of these changes together with a statement of his points as of July 1, 1993. He was given 33 points, which reflected the lowering of 15 points on account of the decrease of the total required for discharge from 90 to 75, together with the points dropped from the least current of the 6-month ''rolling period.''[7]

During this hearing Stallworth asserted that something was wrong with the way his points had been calculated by the Company, which resulted in a total of 74 points on December 10. He didn't know exactly what the problem was, but neither did the General Counsel, or Respondent's counsel, or myself. Indeed, Angela Schmidt, the clerk responsible for keeping attendance records, was very hazy on just how the computations of points were made.

The Respondent, in its brief, maintains that the July 1, 1993 revision in the point system, by reducing the total of points for individuals by 15, in effect abolished the rolling point deduction period. Thus, from July 1, 1993, employees could only accumulate points, and that the sixth month points were no longer dropped at the begining of the current month.

Using this new standard according to Respondent's argument, Stallworth started with 33 points as of July 1, 1993. He then acquired 16 in July, 10 in August, 4 in September, 15 in October, 10 in November, and 18 up to December 10, for a total of 74 with no deductions for any rolling point deduction period.

The problem with this theory of the case is that I do not find anywhere in this record, anything in the transcript or exhibits, that shows that the rolling period was discontinued or that there would, after July 1, 1993, be no deduction of points for the sixth previous month.

In fact, just the opposite seems to be the case. In a memorandum to Stallworth from Gary (Delman) dated July 6, 1993, anouncing the new point system (G.C. Exh. 4), it is stated, after mentioning the 15-point deduction: ''All the rules of the attendance system and attendance bonuses remain the same,'' and, after setting out the warning levels, goes on to say ''Your total below reflects the 15 point drop with the new scale, as well as the points you dropped from the least current of your 6-month rolling period.''

Angela Schmidt, who transferred from payroll to human relations only in September 1993, indicated that her duties included the preparation and maintenance of daily attendence records. She identified her writing on Stallworth's 1993 daily attendance record. She said that in December 1993, when counting up the total points an individual had accumulated, she counted points for the previous 6 months. She testified that the rolling 6-month period continued, so that Stallworth would drop points on a monthly basis, as well as gain points in the current month.[8] In response to a question by Stallworth, Schmidt, despite her answers to Respondent's counsel, admitted that Stallworth would drop points on a rolling basis as set out in the point system.

I think this record shows that the Respondent is in error in its argument that the rolling periods stopped as of July 1, 1993, based solely on Schmidt's answers to counsel's leading questions. I believe the record shows that the rolling period continued after July 1, 1993. I have, therefore, calculated Stallworth's point total based on that continuation.

Starting on July 1 with 33 points, he did not drop any points. The drop of one point for January was built into the calculation of the 33 points (G.C. Exh. 4). This would have brought him up to 45 by July 19 (with 4 points for lateness

[5] See sec. III,D, below for a discussion of this system.

[6] Gonzalez testified that the Company does make allowances for tardiness in heavy snow storms, but January 26 was not one of those days.

[7] In Stallworth's case, this last would have been one point which he had received in January 1993.

[8] I appreciate counsel's elicitation from Schmidt through leading questions of testimony that the 15-point deduction was the only deduction she would make in calculating point totals, and there was some sort of unexplained ''timeframe'' which was crossed between July and December 1993. There is no basis in the record for these questions or answers. I do not doubt that Schmidt was quoting figures given to her by her supervisor, Karen Licinski, but Schmidt herself showed little familiarity with the process of adding and dropping points as the year progressed. She was, in addition, an extremely suggestible witness, answering affirmatively to almost any question. I do not consider her to be a credible or reliable witness. Licinski did not testify here.

on July 8, and 8 points for absence on July 19). He was given a first warning on July 16 for a total of 45 points.[9]

Then, on August 1 Stallworth's total should be a calculation based on the 33 points accumulated by July 1, adding the 16 points given in July, but subtracting 15 points for February, the eldest month in the rolling period, for a total of 43 points.

In August, he picked up 10 more points, but dropped 6 points for March, leaving a total of 47.

In September, he started with 47, added 5, and deducted 18 for April, leaving a total of 34.[10]

In October, he started with 34, received 15, and deducted 5 for May, for a total of 44.

In November, he started with 44, added 10, and dropped 4, for June, totaling 50.

Then, in December, he started with 50, accumulated 18, but dropped 16 for July for a total as of December 10 of 52 points, not 74.

This total would not have merited even a 3-day suspension, certainly not a 2-week suspension and a 60-day probationary period. I note that the suspension notice itself (R. Exh. 1) bears the printed message that during the probationary period ''no points will drop off (the probationer's) point total.'' This makes it even more convincing that the rolling period had not been discontinued down at least to the time the figures I have computed show that the suspension would not have been justified. Then, as of January 1, Stallworth would have dropped another 10 points, for August, leaving a total of 42 points at the time of his discharge on January 26.

On the basis of these facts, and my calculations of Stallworth's point totals for each month from July 1993 to January 1994, it is clear that Stallworth's suspension and discharge were not imposed under the point system then in effect.

As far as establishing a motive for this departure from its plan, the Company has offered only the assertion that the point system was changed. The only evidence offered to substantiate this claim was the testimony of Angela Schmidt, who was really unprepared to respond to technical questions about a rather complicated system, and whose testimony I have not credited. The only other evidence dealing with motivation is that introduced by the General Counsel.

I have already found both implicit and direct threats directed at Stallworth by Gary Delman and Larry Van De Velde on January 7, 1994. Delman had spoken to Stallworth before, during the union campaign, and voiced threats to him. Then, after the election, and the defeat of the Union, in November, here was Stallworth again, in January, in Delman's office describing himself as ''a witness,'' and complaining about the point system. Delman's reaction, coming down to Stallworth after the meeting in his office ended, poking him and threatening to get rid of ''troublemakers'' so that the Company ''could get back to normal,'' was indicative of continuing animus against the Union, and personal animus toward Stallworth as a troublemaker.

Both Delman and Van De Velde were still in their respective positions, vice president for operations and manufacturing manager, in December 1993 and January 1994.

Stallworth's union activity and his loyal support for the Union is undenied on this record.

I, therefore, infer and find that the General Counsel has established a prima facie case that the real reason for Stallworth's suspension and discharge was not because he had accumulated enough points to be suspended and discharged, but that the represented a continuing and menacing presence of a union loyalist, and, thus, had to be terminated. *Wright Line*, supra.

Since the Company has not shown that the point system was changed to eliminate the rolling period for dropping points, and since it has offered no other reason for the disciplining of Aubry Stallworth, I find that the prima facie case established stands unrebutted, and that the Respondent has offered no subtantial evidence that Stallworth would have been disciplined under a correct application of its attendance policy. This conduct has violated Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair pactices, I shall recommend that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the polices of the Act. Having found that Respondent first suspended Aubry Stallworth for 2 weeks, then discharged him in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it rescind the suspension and remove notice of that suspension from Stallworth's files, and that it offer to Stallworth immediate reinstatement to his former, or a substantially equivalent position, and that it make him whole for the discrimination against him including the loss of 2 sick leave days by payment of backpay. All backpay and reimbursement provided herein, with interest, shall be computed in the the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co*., 90 NLRB 289 (1995).

CONCLUSIONS OF LAW

1. The Respondent, Great Lakes Window, Inc., a Subsidiary of Ply Gem Industries, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Aluminum, Brick, and Glass Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

[9] I note the discrepancy in the dates here, but I ascribe that to clerical error. The warning should have been dated on the 19th.

[10] If Respondent's calculations are accurate, as of September 10 Stallworth would have had 59 points, the 33 as of July 1 with 16 added in July, and 10 for August. By my calculations, he would have had 29 points. The September warning fits neither of these computations. If the Company was following what it claims, no, the point total would not have been 42, but 59, which would, under the July 6 memo (G.C. Exh. 4) have resulted in a 3-day suspension.

3. By impliedly threatening its employees with retaliation for their concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

4. By threatening an employee with discharge for his concerted and union activities, the Respondent has violated Section 8(a)(1) of the Act.

5. By suspending and later discharging its employee Aubry Stallworth, the Respondent has violated Section 8(a)(1) and (3) of the Act.

6. These activities of Respondent have a close and intimate relationship to commerce.

[Recommended Order omitted from publication.]